

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Section 272(f)(1) Sunset of the BOC)	
Separate Affiliate and Related)	WC Docket No. 02-112
Requirements)	
_____)	

**REPLY COMMENTS OF THE
UNITED STATES TELECOM ASSOCIATION**

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TABLE OF CONTENTS

	Page
SUMMARY	1
DISCUSSION	3
I. Extension of the RBOCs' Separate Affiliate Requirements Is Not Warranted or Justified by Any of the Reasons Cited in the Comments Filed	3
II. The Market for Long Distance Services Is Competitive	5
III. Competition in the Long Distance Market Prevents RBOCs from Leveraging Their Position in the Local Market To Control the Long Distance Market.....	7
IV. The Commission Should Not Implement Performance Standards and Reporting as Alternative Safeguards to the RBOCs' Separate Affiliate Requirements.....	8
CONCLUSION.....	10

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The United States Telecom Association (USTA),¹ through the undersigned and pursuant to Federal Communications Commission (FCC or Commission) Rules 1.415 and 1.419,² hereby submits its reply comments in the above-docketed proceeding. USTA filed comments in this proceeding on August 5, 2002, responding to the Commission's questions in the *BOC Separate Affiliate Notice (Notice)*.³ In these reply comments, USTA will address comments filed by other interested parties in which they urge the Commission to extend the Regional Bell Operating Companies' (RBOCs') separate affiliate requirements of Section 272 of the Telecommunications Act of 1996 (1996 Act) beyond the time frame established in Section 272(f)(1) for sunset of those requirements.

SUMMARY

The Commission should not extend the time frame for sunset of the RBOCs' separate affiliate requirements, which is specified in Section 272(f)(1). The commenters in this

¹ USTA is the Nation's oldest trade organization for the local exchange carrier industry. USTA's carrier members provide a full array of voice, data and video services over wireline and wireless networks.

² 47 C.F.R. §§ 1.415 and 1.419.

proceeding have demonstrated no competitive or public interest reason to deviate from the time frame that Congress established. The commenters have argued, but not demonstrated, that RBOCs have market power in the local market, which they can use to leverage market power in the long distance market, putting other long distance service providers at a competitive disadvantage. These commenters have failed to acknowledge that not only is the long distance market fully competitive, with the RBOCs having only a minor share of this market, but also that wireless penetration into the local and long distance markets prevents RBOCs from leveraging any perceived market power in the local market to control the long distance market. Furthermore, the Commission should resist the commenters' suggestions to impose performance standards, measurements, and reporting on RBOCs for the special access services and unbundled network elements (UNEs) they provide upon sunset of the RBOCs' separate affiliate requirements because such standards, measurements, and reporting would do nothing more than impose unnecessary burdens on the RBOCs and hinder their ability to compete. Finally, when evaluating the recommendations of the commenters to extend the RBOCs' separate affiliate requirements or to impose alternative constraints in lieu of or in addition to the separate affiliate requirements, the Commission should remain cognizant of its task "to implement section 272 in a manner that ensures that the fundamental goal of the 1996 Act is attained – to open all telecommunications markets to robust competition – but at the same time does not impose requirements on the [Bell operating companies] BOCs that will unfairly handicap them in their ability to compete."⁴

³ *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, FCC 02-148, Notice of Proposed Rulemaking (rel. May 24, 2002) (*BOC Separate Affiliate Notice* or *Notice*). See USTA Comments.

⁴ *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21913, CC Docket No. 96-149 (1996) (*Non-Accounting Safeguards Order*).

DISCUSSION

I. Extension of the RBOCs' Separate Affiliate Requirements Is Not Warranted or Justified by Any of the Reasons Cited in the Comments Filed.

Certain commenters in this proceeding urge the Commission to extend the RBOCs' separate affiliate requirements for some minimum time period (e.g., one year past the three years specified in Section 272(f)(1) to allow for a second biennial audit to be completed before sunset occurs);⁵ for some distant time period in the future (e.g., three years after the date that an RBOC has obtained Section 271 authority for the last state in its region);⁶ or for some indefinite time period (e.g., after the RBOC no longer has local market power or after competition is at some level deemed sufficient by the RBOCs' competitors).⁷ The reasons cited for these proposed extensions – the need to conduct more than one audit in the three-year time frame in which the RBOCs must provide long distance service through a separate affiliate, the lack of competition in the local market, the RBOCs' market power or dominance in the local market, and the RBOCs' ability to leverage their position in the local market to exert control in the long distance market – are not supported by language of the 1996 Act or its legislative history. Further, the reasons cited do not facilitate competition in the local or long distance markets. Finally, the reasons demonstrate no compelling public interest need to extend the requirements. Accordingly, the Commission should not delay, for any period of time, the sunset of the RBOCs' separate affiliate requirements by extending these requirements.

⁵ See Texas PUC Comments at 2, Pennsylvania PUC Comments at 5, Wyoming Public Service Commission Comments at 1, Texas Attorney General Comments at 1.

⁶ See Sprint Comments at 1.

⁷ See Time Warner Comments at 3, Focal Comments at 5, Touch American Comments at 2, 5, New Jersey Division of the Ratepayer at 4, Washington Utilities and Transportation Commission at 1, National Association of State Utility Consumer Advocates Comments at 8. Some commenters claim the separate affiliate requirements should continue for a minimum of three years with the thought that the RBOCs' market power will have dissipated by then. See AT&T Comments at 4, 10, CompTel Comments at 2, WorldCom Comments at 4. One commenter advocated an annual extension of the separate affiliate requirements until an RBOC no longer has the ability to discriminate. See Missouri Public Service Commission Comments at 4.

The Commission should not extend by one year the three-year time frame for sunset specified in Section 272(f)(1) in order to accommodate the completion of a second biennial audit. As Verizon aptly noted in its comments, “Congress knew that adopting biennial, rather than annual, audits would mean that only one full audit would apply in any three-year period for a particular state.”⁸ If Congress had intended for more than one audit to be conducted after an RBOC obtained Section 271 authority and while the RBOC was obligated to provide interLATA services through a Section 272 separate affiliate, then Congress could have required annual audits or it could have set the time frame for sunset to occur four years after the RBOC obtained Section 271 authority. Yet, Congress required neither annual audits nor a four-year sunset period. Accordingly, the Commission should not attempt to override what Congress made clear.

The Commission should not extend the time frame for sunset of the RBOCs’ separate affiliate requirements until three years after an RBOC has obtained Section 271 authority for the last state in its region because there is simply no support in the 1996 Act for any such extension. Such an extension would be contrary to the pro-competitive and deregulatory goals of the 1996 Act because it could indefinitely prevent RBOCs from competing to provide interLATA services on the same basis that other carriers do (*i.e.*, using a bundled package of services that efficiently use network resources)⁹ and because it would continue to regulate RBOCs in a manner that Congress clearly provided would be eliminated three years after an RBOC first obtained Section 271 authority.¹⁰ USTA urges the Commission to implement the 1996 Act’s pro-competitive and deregulatory goals by not adopting any extension of the RBOCs’ separate affiliate requirements.

⁸ Verizon Comments at 12.

⁹ The Commission has recognized that “there are economies of scope where it is less costly for a single firm to produce a bundle of goods or services together, than it is for two or more firms, each specializing in distinct product lines, to produce them separately.” *Non-Accounting Safeguards Order*, 11 FCC Rcd 21905, 21911.

¹⁰ As USTA noted in its comments in this proceeding, USTA believes the plain language of the 1996 Act and its legislative history support the sunset of an RBOC’s separate affiliate requirements for the whole region in which the RBOC provides service three years after the RBOC obtains Section 271 authority in its first state. At a minimum,

The Commission should not extend the timeframe for sunset of the RBOCs' separate affiliate requirements so that sunset would not occur until there was some determination that an RBOC lacked market power or dominance in the local market or until there was some determination that the level of competition for local services was deemed sufficient to prevent an RBOC from discriminating against competitors. Nowhere in the 1996 Act or in its legislative history is there language or an inference that an RBOC's market power or dominance in the local market or that the level of competition in the local market must or should be considered in evaluating whether to extend the RBOCs' separate affiliate requirements. The sunset provision of Section 272 could not be more clear. The RBOCs' separate affiliate requirements for providing interLATA telecommunications services automatically cease to apply three years after the RBOC is authorized to provide such services, unless the Commission extends the three-year period. The commenters in this proceeding have provided no justification for why the Commission should extend the three-year sunset period. Specifically, the commenters have not demonstrated that the RBOCs have market power or dominance in the long distance market – the market for which the RBOCs must use a separate affiliate – or that the RBOCs can leverage any perceived market power or dominance in the local market to gain control of or to dominate the long distance market.

II. The Market for Long Distance Services Is Competitive.

As RBOCs obtain Section 271 authority in states throughout their regions, they are beginning to compete in the long distance market – a market that is highly competitive. The Commission notes in its report on “Trends in Telephone Service” that the long distance market, once monopolized by AT&T, is now fully competitive with more than 700 companies offering

USTA believes the 1996 Act and its legislative history support sunset for a whole Bell operating company (BOC) region, as BOC is defined in the 1996 Act, three years after the RBOC obtains Section 271 authority in the first

long distance services.¹¹ The report identifies, based on data from the year 2000, that the three largest long distance carriers provide almost 64% of all long distance services, with AT&T providing 34.8%, WorldCom providing 20.6%, and Sprint providing 8.3%.¹² The remaining 36% share of the long distance market is allocated among other long distance carriers, all RBOCs, and other local telephone companies, with 28.1%, 5.5%, and 2.7% shares respectively.¹³ Interestingly, these competitors to the three largest long distance carriers are wireline providers of long distance services, but all providers of long distance services are facing stiffer competition from a new type of competitor – the nationwide wireless carriers that offer low, one-rate plans for unlimited local and long distance services.¹⁴

Clearly, the RBOCs have only begun to compete with AT&T, WorldCom, and Sprint for long distance customers. More importantly, the RBOCs are now competing against wireless carriers for both long distance and local services. The Commission's figures on long distance market share and the likelihood of who the major competitors for long distance services will be in the future (*i.e.*, wireless carriers) make clear that the RBOCs do not possess a significant share of the long distance market, much less market power or dominance in that market, and that their ability to gain market share is limited by the growing wireless penetration into the long distance market.

state in that BOC region. *See* USTA Comments at 4-6.

¹¹ *See* "Trends in Telephone Service," Federal Communications Commission, Industry Analysis and Technology Division, Wireline Competition Bureau, May 2002 at 10-1 (Telephone Trends Report). The data supporting the Commission's statement that more than 700 carriers are providing long distance services is year 2000 data. More recent data may indicate that the number of companies providing long distance services now exceeds 900. *See id.* at 10-10.

¹² *See* Telephone Trends Report at 10-14. These percentages are based on total toll service revenue of all long distance toll providers.

¹³ *Id.*

¹⁴ In its *Seventh Annual Report on Mobile Services*, the Commission found that "wireless plans are substituting for traditional wireline long distance." *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Services*, Seventh Report (rel. July 3, 2002) at 33 (*Seventh Annual Report on Mobile Services*).

III. Competition in the Long Distance Market Prevents RBOCs from Leveraging Their Position in the Local Market To Control the Long Distance Market.

Not only is the market for long distance services competitive, but the growth of wireless services,¹⁵ and particularly the one-rate packages offering unlimited local and national long distance services,¹⁶ is an important constraining factor on the RBOCs' ability to leverage any perceived market power or dominance in the local market to capture a dominant or even significant share of the long distance market. For a set, low monthly fee, consumers can make all their local and long distance calls over a wireless phone. RBOCs simply cannot match these wireless plans.¹⁷ Notably, consumers' use of these one-rate plans has triggered the replacement of both wireline local and long distance services with wireless services.¹⁸ For this reason, wireless carriers are becoming, and will continue to be, formidable competitors to all wireline providers of local and long distance services, but particularly to RBOCs, which must comply with artificial separations for providing those services and which are already inhibited in their ability to compete against wireline competitive local exchange carriers that offer both local and

¹⁵ The Commission's *Seventh Annual Report on Mobile Services* stated that at the end of December 2001, mobile telephony subscribership had increased to 128.5 million, which constitutes a nationwide penetration rate of roughly 45 percent of the U.S. population. In addition, 94 percent of the U.S. population lives in counties with access to at least three or more different operators of mobile telephone service. *See Seventh Annual Report on Mobile Services* at 5. Not only do consumers have access to wireless services, but they are using these services more and more. The Commission notes surveys from the Cellular Telecommunications and Internet Association (CTIA), Paul Kagan and Associates, and J.D. Powers & Associates that show increases in average minutes-of-use (MOUs) for mobile services ranging from 22 percent to 51 percent. *Id.* at 21-22.

¹⁶ The Commission notes in its *Seventh Annual Report on Mobile Services* that "today all of the nationwide operators offer a . . . [Digital One Rate] DOR pricing plan that allows customers to purchase a bucket of MOUs on a nationwide network without incurring roaming or long distance charges." *Id.* at 29.

¹⁷ One reason RBOCs have difficulty competing with the wireless carriers' one-rate plans is because the RBOCs must maintain separate affiliates, thereby prohibiting them from using their network resources efficiently and causing consumers to pay higher prices when the RBOCs must offer local and long distance services through separate companies.

¹⁸ Referring to the substitution of wireless services for wireline services, the Commission notes in its *Seventh Annual Report on Mobile Services* that the "number of residential access lines served by BellSouth, SBC, and Verizon dropped by almost 3 percent during 2001, more than 2.5 million lines." *Id.* at 32 (*citing* Linda J. Mutchler *et al.*, *The Next Generation VI: Wireless in the US*, United States Telecom Services – Wireless/Cellular, Merrill Lynch, Mar. 8, 2002 at 85.) The Commission also cites loss of wireline long distance to use of wireless services, noting, for example, an analyst claim "that 20 percent of AT&T's customers, or 5 million people, have replaced some wireline

long distance services through one company. There are no competitive or public interest reasons to extend the RBOCs' separate affiliate requirements.

IV. The Commission Should Not Implement Performance Standards and Reporting as Alternative Safeguards to the RBOCs' Separate Affiliate Requirements.

The competitive local exchange carrier (CLEC) and interexchange carrier (IXC) comments filed in this proceeding¹⁹ bring no new facts or arguments to the table that provide a basis for overcoming the statutory presumption in Section 272(f)(1) that the RBOC separate affiliate requirement should expire three years after each RBOC first obtains Section 271 authority to provide interLATA telecommunications services. This is certainly true with respect to suggestions that in yielding to Congressional intent by allowing the separate affiliate requirement to sunset after three years, the FCC should immediately impose performance measures and reporting requirements on the RBOCs for their special access services and UNE provisioning. The requests are nothing more than pleas by CLECs and IXCs for the FCC to deny the existence of competition in the special access market and impose unnecessary burdens on RBOCs that would not apply to other providers of special access service.

USTA is on record in the *Special Access Performance Metrics* proceeding²⁰ as opposing the imposition of performance measurements or reporting obligations. The market for special access service is highly competitive. That some of the largest competitors in that market would ask the FCC to condition the sunset of Section 272(f)(1) on the imposition of special access measurements and reporting obligations on the RBOCs is not surprising, but it is unwarranted. No competitor in the market for special access services should have performance measurements

long distance usage with wireless." *Id.* at 33 (citing *Carriers Said to Need New Tactics to Combat LD Substitution*, COMMUNICATIONS DAILY, Mar. 15, 2002 (citing Yankee Group analyst Knox Bricken).)

¹⁹ See generally Comments of ALTS, Time Warner Telecom, Focal, Pac-West, US LEC, Covad, AT&T, CompTel, WorldCom and Sprint filed herein on August 5, 2002.

²⁰ *Performance Measurements and Standards for Interstate Special Access Services, et al.*, CC Docket No. 01-321, Notice of Proposed Rulemaking, FCC 01-339 (rel. Nov. 19, 2001) (*Special Access Performance Metrics*).

or reporting obligations imposed upon them. Such requirements are counterproductive because they would restrict needed flexibility, co-opt market-based solutions, distort competition, and add costs that must eventually be recovered from customers. Certainly, given the current market for telecommunications services, the FCC should be looking for ways to remove regulatory costs rather than impose unnecessary costs on carriers and their customers. The only beneficiaries from FCC action to impose regulatory burdens and costs on the RBOCs are those competitors that now petition the FCC to give them a competitive advantage by singling out the RBOCs for special regulatory treatment. It is long past the time for the FCC to eschew the false proposition that by enabling competitors of RBOCs and incumbent local exchange carriers (ILECs) that it is in some derivative way helping consumers. The last two years have demonstrated that durable, meaningful competition comes from competitors that make a commitment to their businesses, the communities they serve, and their customers by investing in facilities. Those prepared to embrace competition through investment, technological innovation, and customer service do not require disparate regulatory treatment of RBOCs and ILECs as an ongoing competitive crutch. By providing such a crutch, the FCC creates a state of perpetual regulatory dependence by those carriers that are unwilling or unable to withstand the rigors of the competitive marketplace rather than an environment for the development of sustainable competition.

As USTA stated in the *Special Access Performance Metrics* proceeding, should there be a customer need for special access measurements and reporting obligations, all carriers should be required to implement such measurements and prepare such reports. Neither RBOCs nor other ILECs should be singled out for special regulatory treatment for their special access services. It is now six and one half years since passage of the 1996 Act. It is long past time for formidable competitors such as AT&T, WorldCom, and Sprint to wean themselves from protective FCC

regulations and compete with all service providers based on price, quality, technological innovation, and customer service.

Although USTA did not file comments in the *UNE Performance Metrics* proceeding,²¹ USTA notes that the decision of the Federal Circuit Court of Appeals for the District of Columbia (Court) in *USTA v. FCC*²² has placed a cloud over the FCC's UNE regime. The industry awaits the Court's decision on pending petitions for rehearing. Assuming that the Court's decision stands and the respective mandates issue, at the very least, line sharing will no longer exist as a UNE, and the FCC will be required to adopt a meaningful limiting standard for its evaluation of UNEs to be provided under Section 251(c)(3) of the 1996 Act. In light of the current status of the FCC's UNE regime, UNE performance measurements and reporting requirements for RBOCs should not serve as a predicate for sunseting the Section 272(f)(1) separate subsidiary requirement.

CONCLUSION

USTA urges the Commission not to extend the three-year time frame set forth in Section 272(f)(1) for sunset of the RBOCs' separate affiliate requirements. There is no competitive or public interest need for any such extension. Further, USTA urges the Commission to refrain from adopting alternatives to the separate affiliate requirements, such as performance measurements and reporting requirements, because they are not necessary and would hinder competition. In conclusion, the Commission should allow the separate affiliate requirements

²¹ *Performance Measurements and Standards for Unbundled Network Elements and Interconnection, et al.*, CC Docket No. 01-318, Notice of Proposed Rulemaking, FCC 01-331 (rel. Nov. 19, 2001) (*UNE Performance Metrics*).

²² *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

imposed on an RBOC by Section 272 of the 1996 Act to sunset automatically for that RBOC's region three years after it first obtained Section 271 authority in a state in its region.

Respectfully submitted,

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